



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 6, 1995

Mr. David B. Casas
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR95-1192

Dear Mr. Casas:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 36272.

The City of San Antonio (the "city") received a request for information relating to an investigation performed by the city's voluntary Equal Employment Opportunity Program. You claim that the requested information is excepted from disclosure under section 552.103(a) of the Government Code. We have considered the exception you claimed and have reviewed the documents at issue.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The city must meet both prongs of this test for information to be excepted under section 552.103(a).

Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it--unless, in other words, we have concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision

Nos. 452 (1986), 350 (1982). This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, and when a requestor hires an attorney who threatens to sue a governmental entity. Open Records Decision Nos. 555 (1990), 551 (1990). You state that the city maintains an Equal Employment Opportunity Program, which has the duty of investigating complaints of city employees about discriminatory treatment in the city work force. You also state that an employee may choose to go directly to the federal Equal Employment Opportunity Commission ("EEOC"), but many choose to go through the city's program first. If an employee is dissatisfied with the result of the city's program, he or she is then free to go to the EEOC. We note that the city's program is not a designated or certified FEP agency under section 2000e-5(c) of title 42 of the United States Code. *See* 29 C.F.R. §§ 1601.3(a), .70, .74, .80. Therefore, it cannot make final determinations on discrimination claims. *See id.* § 1601.77. Consequently, an employee will still be required to file a claim with the EEOC before he or she can sue the city for discrimination. We therefore conclude that litigation is not reasonably anticipated. Consequently, the city may not withhold the requested information under section 552.103.¹

However, we note that certain of the information in the submitted documents is confidential under section 552.117 of the Government Code. If the city employees whose information is contained in these files have made the election under section 552.024 that their home addresses and home telephone numbers, social security numbers, and information that would indicate whether they have family members² be withheld, the city must withhold this information. Act of May 29, 1995, 74th Leg., R.S., ch. 1035, §§ 5, 9, 1995 Tex. Sess. Law Serv. 5127, 5130, 5132 (Vernon).³

¹We note that you state the requestor's husband is currently in litigation with the city in a discrimination suit pending in federal court. This statement, however, is insufficient to establish reasonable anticipation of litigation by the requestor.

²We note that information such as "marital status" and whether the employee has relatives working for the city would tend to indicate whether a government employee has family members. This is a sample of the type of information that must be withheld if the employee has made the election under section 552.024 of the Government Code.

³Even if the employees did not make the election under section 552.024 of the Government Code, the employees' social security numbers may be excepted from disclosure by federal law. A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). Based on the information you have provided, we are unable to determine whether the social security numbers are confidential under this federal statute. We note, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information.

Certain financial information about these city employees is excepted by common-law privacy. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. This office has previously concluded that certain financial information about an individual is excepted from disclosure by common-law privacy. Open Records Decision No. 600 (1992). We have marked the documents to indicate the type of financial information that must be withheld.⁴

Two categories of information in documents submitted to this office for review may be required to be withheld under the Americans with Disabilities Act. We have concluded that this issue warrants a more thorough analysis than is normally possible in the limited scope of an informal letter. Currently, there is an open records decision pending in our office, RQ# 753, which we believe will be dispositive of this issue. Therefore, we are awaiting the issuance of this decision prior to issuing a ruling on this information. We will notify you of our ruling regarding your request as expeditiously as possible. In the meantime, you may withhold these two categories of information. We have marked the documents to indicate what information you may withhold pending the issuance of RQ# 753.

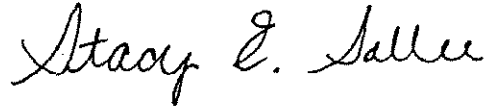
Finally, you claim that "[i]t will impair the City's ability to adequately investigate and address discrimination problems" if the identities of the witnesses are disclosed to the person who is the subject of the investigation. You do not cite us to nor are we aware of any authority that would allow the city to withhold the identity of witnesses in a non-criminal situation. You have not shown that the employees may be subject to harassment or in other danger as a result of the requested release of information. Therefore, the city may not withhold the requested information except as stated above.⁵

⁴There may be additional information that is protected from disclosure by section 552.101. We are unable to determine this from the documents submitted to us for review. Therefore, we are enclosing a list of the types of information that are confidential by statute, constitution, or judicial decision.

⁵Additionally, we do not find *Bexar County Sheriff's Civil Service Commission v. Davis*, 802 S.W.2d 659 (Tex. 1990) to be controlling here. That case dealt with a governmental employee's constitutional due process right to know in advance of a termination proceeding the names of the witnesses against him. There is not a termination proceeding at issue, nor are we addressing the requestor's due process rights, but a request under the Open Records Act. The Open Records Act differs in purpose from statutes and procedural rules providing for discovery in judicial proceedings. Attorney General Opinion JM-1048 (1989).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in cursive script that reads "Stacy E. Sallee".

Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/ch

Ref.: ID# 36272

Enclosures: Marked documents
Confidentiality list

cc: Ms. Ling Yin Liu
(w/enclosure - Confidentiality list)